

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 October 2023

DOCKET NUMBER: AR20230003604

APPLICANT REQUESTS: an upgrade of her under honorable conditions (general) character of service and a personal appearance hearing via video or telephone

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 293 (Application for the Review of Discharge)
- DD Form 214 (DD Form 214 Worksheet)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states, she realized, over time, she made a mistake during service. She obtained her emergency medical technician certification to continue her devotion of helping others. Additionally, her application to the Board notes her request is related to post-traumatic stress disorder (PTSD), other mental health issues, and sexual assault/harassment
3. The applicant enlisted in the Regular Army on 28 June 2000.
4. Her DA Form 2-1 (Personnel Qualification Record - Part II) shows she was assigned to Fort Eustice, VA on 22 September 2000 for advanced individual training (AIT). She completed AIT and was then assigned to Fort Eustice as her first permanent duty station on 8 January 2001.
5. The U.S. Army Criminal Investigation Command (USACID) provided a sanitized copy of information, which includes a Memorandum, dated 19 June 2001, subject: CID Report of Investigation – Final Supplemental Report – [CID case number], Fort Eustis, VA.

a. This report shows, a CID investigation established probable cause to believe private (PVT) (male Soldier) committed the offense of Rape, on or about 29 January 2001, when he engaged in sexual intercourse with the applicant while she was intoxicated and unable to provide consent. The applicant had previously told PVT (male Soldier) she did not want to have sex with him.

b. A copy of the CID report was provided to the applicant, and she was afforded the opportunity to respond; she did not provide a response.

6. The applicant received three counseling's between on 10-15 October 2002, as documented on DA Forms 4856 (General Counseling Form) for:

- failure to be at appointed place of duty on two separate occasions and measures to prevent future situations of this type
- notification to applicant of intent to recommend uniform code of military justice (UCMJ) as a result of disobeying a lawful order not to leave the area after her pass was revoked

7. DA Form 268 (Report to Suspend Favorable Personnel Actions (FLAG) dated 23 October 2002 shows a flag was initiated on the applicant for adverse action.

8. She accepted non-judicial punishment (NJP), under the provisions of Article 15 of the UCMJ on 16 December 2002 for the following misconduct –

a. The applicant, having received a lawful order from sergeant (SGT) A., a noncommissioned officer (NCO), then known by the applicant to be an NCO, to obey her restricted pass status, an order which was the applicant's duty to obey, did, on or about 12 October 2002, willfully disobeyed the same.

b. The applicant, on or about, 10 October 2002, without authority failed to go at time prescribed to her appointed place of duty, to wit: 0500-hours 24th Battalion recall formation located at building 818.

c. The applicant, on or about 9 October 2002, without authority failed to go at time prescribed to her appointed place of duty, to wit: 0840-hours accountability formation located at Jacobs Theater.

9. DA Form 268 (Report to Suspend Favorable Personnel Actions (FLAG) dated 20 December 2002 shows a FLAG was initiated on the applicant for adverse action.

10. The applicant received three counseling's between 20-26 December 2002, as documented on DA Forms 4856 (General Counseling Form) for the following reasons:

- notification of intent to separate her under Army Regulation 635-200 (Personnel Separations – Enlisted Personnel), Chapter 14-12b (Acts of Patterns of Misconduct)
- absence without leave and failure to go to her appointed place of duty
- violate restriction by leaving Fort Eustis

11. A memorandum dated 10 January 2003 show the applicant was seen by the Department of Behavioral Health Services at McDonald Army Community Hospital for a mental status exam. The clinical diagnostic impression was cannabis abuse. She was psychiatrically cleared for any administrative action deemed appropriate by her command.

12. DD Form 2807-1 (Report of Medical History) and DD Form 2808 (Report of Medical Examination) dated 13 January 2003 medically cleared the applicant for separation.

13. The applicant again accepted NJP, under the provisions of Article 15 of the UCMJ on 16 January 2003 for the below misconduct, for which the punishment included, in part, a reduction to the rank/grade of PVT/E-1 –.

a. The applicant did at or near Fort Eustis, VA on or about 22 December 2002, without authority, failed to go at time prescribed to her appointed place of duty, to wit: 0845-hours extra duty, located at building 699.

b. The applicant did at or near Fort Eustis, Virginia on or about 21 December 2002, without authority, failed to go at time prescribed to her appointed place of duty, to wit: 0900-hours extra duty, located at building 699.

14. On 18 March 2003, the applicant's immediate commander notified the applicant of his intent to initiate actions to separate her from service under the provisions of Army Regulation 635-200, paragraph 14-12b, for patterns of misconduct. The commander specifically noted the applicant's inability to comply with military standards that are expected of her as a Soldier. On or about 12 October 2002, she disobeyed a lawful order from a noncommissioned officer. On or about 9 October 2002, 10 October 2002, 21 December 2002, and 22 December 2002, she failed to be at her appointed place of duty.

a. The applicant's immediate commander informed her of her rights and recommended her receipt of an under honorable conditions (general) character of service.

b. The applicant acknowledged receipt of her commander's notification on the same date.

15. On 20 March 2003, the applicant was advised by her consulting counsel of the basis for the contemplated action to separate her for patterns of misconduct under Army Regulation 635-200, Chapter 14, paragraph 14-12b and its effects; of the rights available to her; and the effect of any action taken by her in waiving her rights. She understood that if she had less than 6 years of total active and Reserve military service at the time of separation, under Army Regulation 635-200, Chapter 14, she was not entitled to have his case heard before an administrative separation board.

a. She understood he may expect to encounter substantial prejudice in civilian life if a general discharge under honorable conditions was issued to her.

b. She understood that if he received a discharge certificate/character of service which was less than honorable, he may make application to the Army Discharge Review Board of the Army Board for Correction of Military Records for upgrading; however, he realized that an act of consideration by either board does not imply that his discharge will be upgraded.

c. She made no election to a personal appearance before the board, and she elected not to submit a statement in her own behalf.

16. On 27 March 2003 the applicant's commander formally recommended her separation from service, under the provisions of Army Regulation 635-200, paragraph 14-12b with a general under honorable conditions discharge. The commander also notes the applicant has no potential for further service.

17. On 3 April 2003, the applicant's intermediate commander recommended approval of the separation action with a general under honorable conditions character of service.

18. On 9 April 2003, the separation authority approved the chain of command's recommendation for the applicant's discharge under the provisions of Army Regulation 635-200, chapter 14, paragraph 14-12b, and directed the issuance of a general under honorable conditions discharge.

19. On 21 April 2003, the applicant was discharged under the provisions of Army Regulation 635-200, paragraph 14-12b, by reason of misconduct, with an under honorable conditions (general) characterization of service, a separation code of "JKA" and a reentry code of "3." Her DD Form 214 confirms she was discharge in the rank/grade of PVT/E-1 with an effective date of rank of 16 January 2003, and the form further shows she completed 2 years, 9 months, and 24 days of net active service during the covered period; she was not awarded any personal decorations, nor did she complete her first full term of service.

20. There is no indication the applicant petitioned to the Army Discharge Review Board for an upgrade of his discharge within that Board's 15-year Statute of limitations.

21. Regulatory guidance provides that a discharge under other than honorable conditions was normally considered appropriate for Soldier's discharged under the provisions of Army Regulation 635-200, chapter 14. However, the separation authority could direct a general discharge if such were merited by the Soldier's overall record.

22. The applicant provided argument and/or evidence the Board should consider, along with the applicant's overall record, in accordance with the published equity, injustice, or clemency determination guidance

23. MEDICAL REVIEW:

a. The applicant is applying to the ABCMR requesting her under honorable conditions (general) discharge be upgraded. She contends that she experienced military sexual trauma (MST) and resultant mental health conditions including PTSD that mitigates her misconduct.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted in the Regular Army on 28 June 2000; 2) A CID investigation established probable cause to believe the applicant experienced MST on 29 January 2001; 3) The applicant received multiple counselings and non-judicial punishments between October-December 2002 for failing to be at appointed place of duty on time and disobeying an order from an NCO; 4) The applicant was discharged on 21 April 2003, Chapter 14-12b, by reason of misconduct. Her service characterization was (general) under honorable conditions.

c. The Army Review Board Agency (ARBA) Medical Advisor reviewed the supporting documents and the applicant's military service and medical records. The VA's Joint Legacy Viewer (JLV) was also reviewed. No additional medical documentation was provided.

d. The applicant asserts she experienced MST and resultant mental health conditions including PTSD, while on active service. The applicant was seen for a mental status exam on 10 January 2003, as part of her separation proceedings. The diagnostic impression was cannabis abuse, and she was psychiatrically cleared for any administrative action deemed appropriate by her command. A review of JLV was void of behavioral health documentation, and the applicant does not receive any service-connected disability.

e. Based on the available information, it is the opinion of the Agency BH Advisor that there is sufficient evidence to support the applicant had condition or experience that mitigated her misconduct. Also, in accordance with the liberal consideration memo, the applicant's contention of MST and/or mental health condition alone is sufficient to be considered by the board in reaching its final determination.

Kurta Questions

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? Yes, the applicant contends she was experiencing symptoms of mental health conditions including PTSD related to her MST that contributed to her misconduct. There is sufficient evidence the applicant experienced MST while on active service, but there is insufficient evidence the applicant has been diagnosed with a resultant mental health condition including PTSD.

(2) Did the condition exist or experience occur during military service? Yes, there is sufficient evidence the applicant experienced MST while on active service. She is contending she was also experiencing symptoms of a mental health condition including, PTSD while on active service which were related to her MST.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes, there is sufficient evidence the applicant was exposed to MST during her active service. While there is insufficient evidence the applicant has been diagnosed with resultant mental health condition including PTSD, she did clearly demonstrate behaviors consistent with exposure to traumatic event. These behaviors were labeled as misconduct. In addition, the applicant was identified as abusing cannabis, which was likely an attempt to self-medicate to avoid negative emotions associated with the experience of trauma. Therefore, there is sufficient evidence to support the applicant had condition or experience that mitigated her misconduct, and it is recommended her discharge be upgraded and the narrative reason for her separation be amended to Secretarial Authority.

BOARD DISCUSSION:

1. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

2. After reviewing the application, all supporting documents and the evidence found within the military record, the Board determined that relief was warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records and DoD published guidance for consideration of discharge upgrade requests.

The Board considered the frequency and nature of the misconduct and reason for separation. The Board found sufficient evidence of in-service mitigating factors to overcome the misconduct and weigh in favor of a clemency determination. After due consideration of the request, the Board determined that the evidence presented sufficient to warrant a correction and a correction to the character of service warranted.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by amending the applicant's DD Form 214 for the period ending 21 April 2003 showing

- Characterization of Service: Honorable
- Separation Authority: No change
- Separation Code: No change
- Reentry (RE) Code: No change
- Narrative Reason for Separation: Secretarial Authority

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, Section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation 635-200, in effect at the time, set forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. Chapter 14 established policy and prescribed procedures for separating members for misconduct. Specific categories included minor disciplinary infractions, a pattern of misconduct, commission of a serious offense, conviction by civil authorities, desertion, or absences without leave. Action would be taken to separate a member for misconduct when it was clearly established that rehabilitation was impracticable or was unlikely to succeed.

(1) Soldiers are subject to separation under the provisions of this chapter under, paragraph 14-12c for commission of a serious military or civilian offense if the specific circumstances of the offense warrant separation and a punitive discharge would be authorized for the same of closely related offense under the Manual for court-martial.

(2) A discharge under other than honorable conditions was normally considered appropriate. However, the separation authority could direct a general discharge if such were merited by the Soldier's overall record.

3. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

4. Section 1556 of Title 10, United States Code, requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

5. Army Regulation 15-185 (ABCMR), paragraph 2-11, states applicant's do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//